No. 243

In the Supreme Court of the United States

OCTOBER TERM, 1939

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

F. W. FITCH

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONER

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OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 10–13) is unreported. The opinion of the Circuit Court of Appeals is reported in 103 F. (2d) 702.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 29, 1939 (R. 71). Petition for writ of certiorari was filed July 29, 1939, and was granted October 9, 1939. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the payments to the respondent's divorced wife from the income of a trust which was created by him for her maintenance and support and which was ratified in the divorce decree of an Iowa court should be included in the respondent's taxable income.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved will be found in the Appendix, *infra*, pp. 26–27.

STATEMENT

The facts as found by the Board of Tax Appeals (R. 10–12) and stipulated by the parties (R. 19–61) are substantially as follows:

The taxpayer, a resident of Des Moines, Iowa, is the divorced husband of Lettie S. Fitch, to whom he was married in 1892. They lived together as husband and wife until 1917, and had four children. In that year, they separated. In 1919, taxpayer purchased a home for his wife at a cost of $5,000, furnished it for her, and gave her an automobile. In the same year, the F. W. Fitch Company was incorporated, and acquired the assets of a predecessor partnership in exchange for 2,000 of its shares. Of these shares 1,860 were issued to taxpayer and 10 to his wife, who was elected vice president and a director of the corporation; and by reason of taxpayer's control, she received from it $300 a month, although she had no regular hours

of employment and did not devote much time to its affairs (R. 10).

On December 27, 1922, Lettie S. Fitch filed a suit for separate maintenance against taxpayer in the District Court of Polk County, Iowa. This suit was dismissed, without prejudice (R. 20), on April 7, 1923, after the parties had agreed upon a settlement. In accordance with the settlement, taxpayer leased certain premises, owned by him, to the F. W. Fitch Company for 99 years at an annual rental of $12,000, and on April 23, 1923, joined his wife and the Bankers Trust Company as trustee in the execution of a trust agreement, under which the real estate and the lease thereon were transferred to the trustee to hold title, collect the rents, and after the deduction of expenses to pay to Lettie S. Fitch $600 a month during her life and the remainder to taxpayer during his life. The trust was to continue throughout the joint lives of the taxpayer and his wife and in any event for a period of 15 years. In the event of the death of the taxpayer or his wife prior to the termination of the trust his or her portion of the trust income is to be payable to their children. At the expiration of the trust the corpus is distributable to the children. Upon creation of this trust, the terms of which have been and are now being substantially complied with, the wife ceased to be an officer and director of the F. W. Fitch Company, and received no further payments from it (R. 10–11, 35, 36).

On April 14, 1925, Lettie S. Fitch filed a suit for divorce against taxpayer in the District Court of Polk County, Iowa, alleging cruelty, desertion, and failure to provide for her and a minor child in a proper manner, and praying for the custody of the child, the only one then a minor, and for a money judgment against taxpayer. In his answer taxpayer alleged *inter alia* that he had created the above-mentioned trust for her benefit in settlement of the prior suit for maintenance; that (R. 11):

> * * * She is now and was receiving this $600.00 per month at the time she filed her petition herein, claiming that the defendant had failed to provide for her and for the minor child in a proper manner. * * *

and that (R. 11):

> This constituted and now constitutes a full and complete settlement and gives to the plaintiff an amount in excess of what she is in equity entitled to, and the plaintiff, at the time orally agreed with the defendant that the amount given her was sufficient for all time, and that plaintiff and defendant should go their respective ways without interference with each other.

On December 17, 1925, the court entered a decree finding (R. 59)—

> * * * it appearing to the court that the parties * * * have entered into an agreement of settlement of all of their property matters and alimony without the aid of the court, and that the agreement has been per-

> formed and division of the property and provisions for alimony made in accordance therewith; * * * and the court having heard the evidence, and being fully advised in the premises, finds that the plaintiff is entitled to the relief prayed for in her petition as against Fred W. Fitch, and is entitled to an absolute divorce, and is entitled to the property and alimony settlement.

The decree granted the wife an absolute divorce and the custody of the minor son and further provided (R. 11–12):

> * * * that the trust agreement which is referred to in the defendant's answer * * * be, and the same is hereby ratified and confirmed by the court; and that the property and alimony settlement made by the parties be, and it is hereby confirmed by the court.

Pursuant to this decree taxpayer transferred to Lettie S. Fitch 600 shares of the common stock of the F. W. Fitch Company, which on December 31, 1925, had a book value of $77,959.80 and paid to her attorney the sum of $23,500, of which she received $8,500, the balance representing counsel fees and expenses (R. 12).

During 1933 the trustee under the trust of April 23, 1923, distributed to Lettie S. Fitch $7,128, which the Commissioner included in taxpayer's taxable income (R. 12).

The Board, relying upon *Douglas* v. *Willcuts*, 296 U. S. 1, upheld the Commissioner, and found a

deficiency in tax in the amount of $1,555.58 (R. 13). The Circuit Court of Appeals, one judge dissenting, held *Douglas* v. *Willcuts* distinguishable, and reversed the decision of the Board of Tax Appeals.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In excluding from the gross income of the respondent income paid to his divorced wife pursuant to the provisions of a trust established by respondent for her maintenance and support, which trust was ratified and confirmed in a divorce decree.

2. In failing to hold respondent taxable under the doctrine of *Douglas* v. *Willcuts*, 296 U. S. 1, upon the said income, as income paid out to his wife under a trust created by him to discharge his legal obligation to support her.

3. In holding that the considerations that the alimony trust may not, subsequent to the divorce decree, be modified by the state court and that the settlor has not agreed to make up deficiencies in the income render the doctrine of *Douglas* v. *Willcuts* inapplicable.

4. In failing to affirm the decision of the Board of Tax Appeals, and in reversing that decision and remanding the cause.

SUMMARY OF ARGUMENT

The trust was created for the purpose of discharging respondent's subsisting obligation to support his wife. It was ratified by the divorce court

as a means by which he was to discharge that duty after the divorce. The income from the trust is therefore taxable to the respondent, just as though he had received it and then paid it over to his wife. *Douglas* v. *Willcuts*, 296 U. S. 1.

That the divorced wife must look solely to the trust is immaterial. It was the act of the respondent which permanently devoted the trust income to his obligation. The trust itself is in substance equivalent to a continuing exercise by the settlor of the power to direct the application of the income along the predetermined channels.

There is no essential difference between the case at bar and *Douglas* v. *Willcuts*. Although the Minnesota court in *Douglas* v. *Willcuts* had the power to modify the alimony decree thereafter, the fact that such continuing power of modification may be absent in Iowa is inconsequential. In any event, however, the Iowa law does permit the divorce court to alter the alimony decree, so that even this alleged difference between *Douglas* v. *Willcuts* and the instant case vanishes.

ARGUMENT

UNDER THE PRINCIPLES OF DOUGLAS *v.* WILLCUTS THE INCOME IN QUESTION IS TAXABLE TO THE HUSBAND

1. The trust here involved was executed while a suit for separate maintenance was pending (R. 10-11). The divorce suit was filed two years later (R. 11). While the divorce proceedings were

pending, the taxpayer and his wife agreed upon a property and alimony settlement (R. 59). The agreement provided for the immediate payment of a sum of money, for the transfer of certain securities, and for the continuance of the trust theretofore created. This agreement was approved by the Iowa court (R. 11–12, 59–60), which specifically decreed that the trust agreement "be, and the same is hereby ratified and confirmed * * *" (R. 60).

Thus, the Iowa court accepted the trust as marking out the extent of the husband's duty of support thereafter. In Iowa a judgment for alimony creates no new obligation; it simply determines the extent of the existing obligation and regulates the manner of its performance. *Martin* v. *Martin*, 65 Iowa 255; *McNally* v. *Emmetsburg National Bank*, 197 Iowa 602, 609. Although the spouses may contract with reference to the amount of alimony to be awarded, the local courts nevertheless undertake to scrutinize the agreement very closely, and the contract will not be enforced unless it appears to have been fairly entered into, and to be reasonable, just and fair to the wife. *Martin* v. *Martin*, *supra*. Cf. *Olds* v. *Olds*, 219 Iowa 1395, 1406. And when such a contract is approved by the court it is merged with and becomes a valid part of the divorce decree. *Reppert* v. *Reppert*, 214 Iowa 17, 23; *Belding* v. *Huttenlocher*, 177 Iowa 440, 447–448; *Nicolls* v. *Nicolls*, 211 Iowa 1193, 1200.

The property and alimony settlement in this case was approved by the court after hearing the evidence (R. 59). Accordingly, the trust was intended by the parties to be, and was ratified by the court as the means whereby the husband discharged his obligation to his wife after divorce. Translated into dollars, the obligation was $600 a month, payable out of the income of the trust, and was thus coextensive with the terms of the trust. The income from the trust, when so applied in discharge of the husband's obligation, was therefore taxable to him under the principles of *Douglas* v. *Willcuts*, 296 U. S. 1.

In *Douglas* v. *Willcuts*, a husband, in anticipation of divorce, had created a trust for his wife to pay her $15,000 a year for a fixed period, and $21,000 a year thereafter. Excess income was to be paid to him, but in the event of any deficiency in income the trustee could call upon him for the difference, and upon his failure to pay the difference the trustee was authorized to make up the deficiency out of corpus. The parties had agreed that these provisions for the wife were "in lieu of, and in full settlement of alimony, and of any and all dower rights or statutory interests in the estate" of her husband, and "in lieu of any and all claims for separate maintenance and allowance for her support." (P. 3.) A divorce decree entered thereafter provided that the provisions in the trust for the wife's benefit were to be in lieu of all alimony

or interest in the property of the husband. In holding the husband taxable with respect to the income of that trust, this Court said (pp. 8–9):

> Petitioner's contention that the district court did not award alimony is not supported by the terms of the decree. It described the provision as made "in lieu of all *other* alimony or interest in the property or estate of the defendant." *However designated, it was a provision for annual payments to serve the purpose of alimony,* that is, to assure to the wife suitable support. The fact that the provision was to be in lieu of any other interest in the husband's property did not affect the essential quality of these payments. Upon the preexisting duty of the husband the decree placed a particular and adequate sanction, and imposed upon petitioner the obligation to devote the income in question, through the medium of the trust, to the use of his divorced wife.
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> * * * * *
>
> We have held that income was received by a taxpayer, when, pursuant to a contract, a debt or other obligation was discharged by another for his benefit. * * * The creation of a trust by the taxpayer as the channel for the application of the income to the discharge of his obligation leaves the nature of the transaction unaltered. *Burnet* v. *Wells, supra.* [289 U. S. 670.] * * * [Italics supplied.]

These principles have been applied in an impressive number of cases. *Helvering* v. *Corey,* 297 U. S.

694, reversing *per curiam*, 79 F. (2d) 661 (C. C. A. 3d); *Helvering* v. *Schweitzer*, 296 U. S. 551, reversing *per curiam*, 75 F. (2d) 702 (C. C. A. 7th), rehearing denied, 296 U. S. 665; *Helvering* v. *Stokes*, 296 U. S. 551, reversing *per curiam*, 79 F. (2d) 256 (C. C. A. 3d), rehearing denied, 296 U. S. 665; *Helvering* v. *Blumenthal*, 296 U. S. 552, reversing *per curiam*, 76 F. (2d) 507 (C. C. A. 2d); *Donnelley* v. *Commissioner*, 101 F. (2d) 879 (C. C. A. 7th), certiorari denied, June 5, 1939, No. 938, October Term, 1938; *Glendinning* v. *Commissioner*, 97 F. (2d) 51 (C. C. A. 3d); *Alsop* v. *Commissioner*, 92 F. (2d) 148 (C. C. A. 3d), certiorari denied, 302 U. S. 767, rehearing denied, 303 U. S. 666; *Hill* v. *Commissioner*, 88 F. (2d) 941 (C. C. A. 8th); *Commissioner* v. *Grosvenor*, 85 F. (2d) 2 (C. C. A. 2d); *Metcalf* v. *Commissioner*, 40 B. T. A. 177; *Barbour* v. *Commissioner*, 39 B. T. A. 553; *Weir* v. *Commissioner*, 39 B. T. A. 400; *Knight* v. *Commissioner*, 39 B. T. A. 436; *Dixon* v. *Commissioner*, 39 B. T. A. 527; *Tilles* v. *Commissioner*, 38 B. T. A. 545, 548-549; *Goldring* v. *Commissioner*, 36 B. T. A. 779; *Hogan* v. *Commissioner*, 35 B. T. A. 26; *Whitaker* v. *Commissioner*, 33 B. T. A. 865.

We respectfully submit that the instant case calls for the application of the same principles. The decree of the Iowa court confirms and embodies the husband's obligation to devote the income in question, through the medium of the trust, to the use of his wife. That income stands substantially on the same footing as though he had

received it personally and had been required by the decree to make payment directly to his wife.

Here, as in *Douglas* v. *Willcuts*, the trust income serves as a substitute for payments made directly by the husband, and in every real sense confers upon him a direct benefit which constitutes taxable income to him. As Judge Woodrough said in his note of dissent, the decision of the Board should have been affirmed upon the authority of *Douglas* v. *Willcuts* (R. 71).

The majority of the court below, however, undertook to distinguish *Douglas* v. *Willcuts*. That distinction was simply that the creation of the trust in the *Douglas* case did not itself discharge the husband of his duty of support, since (1) the trustee in the *Douglas* case was given the right to call upon the husband to make up any deficiency in the income of the trust whereas the husband's obligation here was limited to the trust itself, and (2) under Minnesota law, which was applicable in the *Douglas* case, the divorce court could at any time thereafter modify the alimony decree, whereas, under Iowa law, no such power was said to remain in the divorce court.[1] The court below said (R. 69):

> In the Douglas case, the legal liability to his wife continued throughout the tax year because he expressly agreed that if the trust

[1] We will assume *arguendo* in this portion of the argument that the court below correctly interpreted the Iowa law as to the existence of a continuing jurisdiction in the

> income should fall below $15,000.00 in any year, he would make up the deficiency, and the divorce decree confirmed that liability. In addition to this, the law of Minnesota continued his liability for the support of his divorced wife and vested a continuing jurisdiction in the courts to supervise and revise both the decree and the trust agreement to that end. * * *

In making the decision turn upon so thin a distinction, we submit that the court stressed considerations that were not crucial to the result in *Douglas* v. *Willcuts*. It is true that in reciting the facts this Court did state that deficiencies in the trust income were to be made up in a prescribed manner (296 U. S., p. 3). And the Court did refer to the power of the Minnesota court to revise its alimony decree (296 U. S., pp. 6–7), in the course of a general discussion of the state law establishing that the trust operated to discharge legal obligations imposed by a court not bound by the trust provisions. But the Iowa court was likewise not bound to accept the trust as discharging respondent's obligation. *Martin* v. *Martin*, 65 Iowa 255. In adopting the trust, the Iowa court simply ruled in substance that the obligation was coextensive with the terms of the trust, and thus decreed in

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divorce court to modify the alimony decree. However, we believe that the court below was mistaken in its understanding of the Iowa law, and we will urge later, pp. 20–23, that the continuing power to modify the alimony decree does exist in Iowa.

advance the extent of the husband's future liability. The income derived from that trust, therefore, did operate to fulfill the obligation which the state court had marked out. The fact that the Minnesota court could later modify the decree made more striking the application of the principles announced in *Douglas* v. *Willcuts*. But we submit that it was not the pith of the decision.

The Court in *Douglas* v. *Willcuts* likewise commented at some length (296 U. S., p. 8) upon the fact that the Minnesota court—

> did not approve the trust agreement as one deriving efficacy from the action of the parties. The court made its own requirement. The decree required the petitioner to "provide and create the trust fund." While the terms of the trust as set up in the trust agreement were approved, the court made those terms its own. It was from this action of the court that the trust derived its force.

Yet, within three months, in *Helvering* v. *Coxey*, 297 U. S. 691, the Court ruled per curiam that the grantor of an alimony trust was taxable, even though the decree of the state court made no mention whatever of the trust. We believe that the continuing power of the Minnesota court, together with the grantor's contingent liability to make up deficiencies, were no more essential to the decision in *Douglas* v. *Willcuts* than was the fact that the Minnesota court ratified and adopted the trust.

The critical element in *Douglas* v. *Willcuts* was, we submit, that the trust operated to discharge the taxpayer's obligation to his wife, whether or not that obligation could be increased, or whether or not it was fortified by a contingent liability to make up deficiencies. In Iowa, as in Minnesota, the divorce court may mark out the husband's duty of future maintenance, and enter an appropriate order. And where the court determines that the income from a trust established by the husband is adequate provision for such maintenance, the subsequent application of that income carries out that obligation, and should be taxable to the husband.

Moreover, the income from the trust was $12,000 a year, of which only $7,200 was payable to the wife. There was accordingly a comfortable margin of security that her alimony would be paid. For, her $600 a month was to be paid first, and only the remaining income was to be paid to the grantor (R. 38). Thus, the fact that the grantor's remainder income actually did serve as a cushion to guarantee, at least in part, his wife's alimony, is comparable to the continuing contingent obligation of the husband in *Douglas* v. *Willcuts*.

Similarly, by establishing a trust with a sufficiently large amount of principal, the husband in nearly every case could fairly insure his wife a specified annual income without personally assuming responsibility to make up any deficiencies. As a practical matter, the difference between such a situation and *Douglas* v. *Willcuts* would be negli-

gible. Yet the decision below, turning as it does upon a continuing liability to make up a hypothetical deficiency, would require a different result. We believe that this Court could not have intended *Douglas* v. *Willcuts* to be so drastically limited by so attenuated and so meaningless a distinction.

The only difference between this case and *Douglas* v. *Willcuts*, is the *extent* of the obligation rather than the *existence* of the obligation. In both situations the husband had, at the time of the divorce decree, an obligation towards his wife. In both cases, the divorce court marked out the limits of that obligation. In *Douglas* v. *Willcuts*, that obligation involved not only the income from the trust, but also a collateral obligation to make up deficiencies. Here the obligation was limited to the trust itself. But in each case, the income was applied to discharge the obligation decreed by the divorce court. And in both the trusts were merely the predetermined channels for the payment of the income in fulfillment of the duty to support. That he may not be under any additional obligation should not change the essential quality of the income of the trust as thus applied in lieu of alimony.

The decision below represents a departure from the sound principles established by *Douglas* v. *Willcuts*. In considering the precise question here presented, the Board of Tax Appeals has taken the unusual step of refusing to follow the decision of the Circuit Court of Appeals in the instant case.

In *Metcalf* v. *Commissioner*, 40 B. T. A. 177, the Board plainly declared (p. 180):[2]

> *Fitch* v. *Commissioner*, * * * is directly contrary to the result we reach here. * * * Despite our respect for that tribunal, we find ourselves unable to follow the reasoning of the *Fitch* case. * * *

If the decision below is permitted to stand unreversed, its sterile refinements will practically strip *Douglas* v. *Willcuts* of any real significance. And the absurd limits to which those refinements may lead is strikingly revealed in *Helvering* v. *Leonard*, 105 F. (2d) 900 (C. C. A. 2d), now pending upon the Government's petition for certiorari, No. 426, present Term.

In the *Leonard* case, as in the instant case, the husband undertook no personal obligation to guarantee any specified amount of income to the wife. But the trust contained a large amount of bonds, which he guaranteed both as to principal and interest, and in case of default he agreed to substitute cash or securities in lieu thereof. See *Leonard* v. *Commissioner*, 36 B. T. A. 563, 564; and see also record in No. 426, p. 24. Thus, by establishing a trust with sufficient corpus, by undertaking to maintain the corpus at a fixed level, and by agreeing to guarantee a specified return upon the investments of the trust, the husband could achieve

[2] The Board in the *Metcalf* case also rejected *Commissioner* v. *Tuttle*, 89 F. (2d) 112 (C. C. A. 6th), which was relied upon by the court below in the instant case.

almost the identical result as in *Douglas* v. *Willcuts*, without, however, subjecting himself to tax.[3] We respectfully submit that this Court could not have intended *Douglas* v. *Willcuts* to rest upon so unreal and so metaphysical a foundation.[4]

Moreover, the result reached below and in the *Leonard* case permits the husband to circumvent an express prohibition in the statute and regulations. Section 24 (a) (1), *infra*, provides that no deduction shall be allowed in respect of "Personal, living, or family expenses," and Article 281 of Regulations 77, *infra*, construing the statute, provides that alimony may not be deducted from gross.

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[3] Both *Helvering* v. *Leonard* and its companion case, *Fuller* v. *Helvering*, 105 F. (2d) 903 (C. C. A. 2d), pending on petition for certiorari, No. 427, present Term, necessitated the overruling of an earlier Second Circuit decision, *Helvering* v. *Brooks*, 82 F. (2d) 173 (C. C. A. 2d). See also *Commissioner* v. *Hyde*, 82 F. (2d) 174 (C. C. A. 2d).

[4] The lack of any substantial difference between the *Leonard* case and *Douglas* v. *Willcuts* is brought into even sharper relief by the fact that the husband in the *Leonard* case undertook to pay the wife $35,000 a year exclusive of the trust, and this liability was subject to future modification on account of changed circumstances. Obviously, any marked change in the income from the trust would be such a new circumstance, and would undoubtedly be reflected in any subsequent order altering the husband's personal liability.

Thus, by combining the various elements present in the *Leonard* case, the rule of *Douglas* v. *Willcuts* would be rendered practically meaningless simply by invoking the glib formula that he is not taxable where there is no continuing obligation to make up deficiencies in the specified annual amounts to be paid to the wife.

income. Had the grantor held the property without the interposition of the trust, and simply paid out the income therefrom to his wife as alimony he would have been chargeable with the full amount of that income and would not have been entitled to any deduction on account of the alimony paid out. The decision below permits him to achieve the same result by creating a trust, but without rendering him liable for tax with respect to the income. In essence, it awards him the very deduction that Congress has denied him.

Furthermore, the basic issue before the Court is whether the income in question falls within the definition of gross income as set forth in Section 22 (a), *infra*, and the broad sweep of that definition has often been said to be coextensive with the power of Congress under the Constitution. *Helvering* v. *Stockholms &c. Bank*, 293 U. S. 84, 89; *Douglas* v. *Willcuts*, *supra* at 9; *United States* v. *Safety Car Heating Co.*, 297 U. S. 88, 93; *Helvering* v. *Midland Ins. Co.*, 300 U. S. 216, 223; *Irwin* v. *Gavit*, 268 U. S. 161, 166. However, it seems clear beyond question that there can be no constitutional objection to the tax here involved. For, in *Burnet* v. *Wells*, 289 U. S. 670, this Court sustained a tax upon the grantor of an irrevocable trust established to pay premiums on policies of insurance taken out on his own life for the benefit of others. No legal obligation of any kind was there involved. At most the trust served to discharge a moral obligation owed by the grantor to his family. Yet it accom-

plished a result which to him was desirable, and which he would otherwise have been compelled to achieve by the use of his own funds or unrestricted income. By employing an irrevocable trust, he had merely devoted a portion of his future income to that end. The Court commented upon the various trust devices employed in order to defeat taxes in which the common element was the surrender of title to another while retaining the substance of enjoyment. And in sustaining the tax, the Court remarked (p. 677):

> At times escape has been blocked by the resources of the judicial process without the aid of legislation. * * * In these and other cases there has been a progressive endeavor by the Congress and the courts to bring about a correspondence between the legal concept of ownership and the economic realities of enjoyment or fruition. * * *

2. Thus far, we have urged that the basis upon which the court below undertook to distinguish *Douglas* v. *Willcuts* is unsound, and we contended that neither the continued power of the state court to modify the decree nor the contingent obligation to make up any hypothetical deficiencies should be pivotal. And for the purpose of argument we assumed that the court below had correctly interpreted the Iowa law as forbidding any subsequent modifications of the alimony decree. However, we believe that the court erred in its interpretation of the Iowa law, and that the power to modify does exist in Iowa.

At the very outset, Section 10481 of the Iowa Code plainly and unambiguously declares:

> *Alimony—custody of children—changes.*—When a divorce is decreed, the court may make such order in relation to the children, property, parties, and the maintenance of the parties as shall be right.
>
> *Subsequent changes may be made by it in these respects when circumstances render them expedient.* [Italics supplied.]

And the Supreme Court of Iowa has often recognized the existence of the power of modification, either by expressly approving a modification, or by denying the modification sought on the ground that there had not been a showing of sufficient facts to justify the change. *Nicolls* v. *Nicolls*, 211 Iowa 1193; *Handsaker* v. *Handsaker*, 223 Iowa 462; *Boquette* v. *Boquette*, 215 Iowa 990; *Toney* v. *Toney*, 213 Iowa 398; *Morrison* v. *Morrison*, 208 Iowa 1384; *Jasper* v. *Jasper*, 188 Iowa 1247; *Kirk* v. *Kirk*, 222 Iowa 945; *Junger* v. *Junger*, 215 Iowa 636; *Stone* v. *Stone*, 212 Iowa 1344; *McNary* v. *McNary*, 206 Iowa 942; *Goldsberry* v. *Goldsberry*, 217 Iowa 750, 755–758; *Ferguson* v. *Ferguson*, 111 Iowa 158.

The Iowa cases cited by the court below are all distinguishable. Thus in *Spain* v. *Spain*, 177 Iowa 249, the original divorce decree had made no provision whatever for alimony, but the wife later attempted to have the court enter a decree for alimony. The court pointed out that the statute did not give it power to award alimony where none

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had been provided in the original decree but it was very careful to state[2] (pp. 257–258, 260):

> It is doubtless true that, where an allowance is made in the original decree for maintenance of the wife, this is subject to change on account of changed conditions. * * *
>
> * * * * * *
>
> Had there been a provision for future maintenance, then either might have had a modification thereof upon a change in conditions and some equitable reason given for either enlarging or reducing it. * * *

In *Kraft* v. *Kraft*, 193 Iowa 602, likewise relied upon by the court below (R. 68), provision had been made in the original divorce decree for "permanent" alimony in the form of a lump sum. The wife had obtained two successive modifications of the decree increasing her rights, and was seeking a third increase. The court denied the request upon the ground that there was (p. 606) "no evidence to show that there has been any material change in conditions after the second order * * *." However, it is true that the court did go on to say, in dictum, that modification was not permissible where alimony had been awarded "in a lump sum" or where it consisted of "a division of the real property of the parties" (pp. 607–608). To the extent that this language could in any way be con-

[2] The distinction upon which *Spain* v. *Spain* turned has been similarly employed in other states. See Schouler, *Marriage, Divorce, Separation and Domestic Relations* (6th Ed.), § 1807

strued as denying the existence of the power of modification generally, it is without doubt contrary to the great weight of the Iowa decisions, and particularly of the more recent Iowa decisions. And even to the extent that it refers merely to lump-sum settlements, it is inconsistent with the ruling in the very case before the court since the court left undisturbed the two prior increases in alimony.

None of the three remaining cases (*Barish* v. *Barish*, 190 Iowa 493; *Carr* v. *Carr*, 185 Iowa 1205; *McCoy* v. *McCoy*, 191 Iowa 973) cited by the court below (R. 68) supports the broad proposition for which they were invoked.

3. Although we believe that the Iowa court retained the power to modify the alimony decree and that this case is therefore not distinguishable from *Douglas* v. *Willcuts* even on this ground, we nevertheless urge the Court not to rest the decision upon that basis. For, not only would a holding on that ground establish an unsound distinction, productive of diversity of tax consequences in substantially identical situations, but every case would require the Treasury to make an extended inquiry into local law to determine from the perplexing maze of state statutes, decisions, and dicta, often oblique and conflicting, whether the particular alimony decree is subject to subsequent modification. And although taxability may, and sometimes should turn upon local law, such dependence exists only where it is clearly called for by the federal act.

The guiding principle has been plainly stated in *Burnet* v. *Harmel*, 287 U. S. 103, 110:

> The exertion of that power [to tax] is not subject to state control. It is the will of Congress which controls, and the expression of its will in legislation, in the absence of language evidencing a different purpose, is to be interpreted so as to give a uniform application to a nation-wide scheme of taxation. * * * State law may control *only* when the federal taxing act, by *express language* or *necessary implication*, makes its own operation dependent upon state law. [Italics supplied.]

See also *Lyeth* v. *Hoey*, 305 U. S. 188, 193; *Heiner* v. *Mellon*, 304 U. S. 271, 279; *Thomas* v. *Perkins*, 301 U. S. 655, 659; *McFeely* v. *Commissioner*, 296 U. S. 102, 107–108; *Palmer* v. *Bender*, 287 U. S. 551, 555–556; *Bankers Coal Co.* v. *Burnet*, 287 U. S. 308, 310–311; *Weiss* v. *Wiener*, 279 U. S. 333, 337; *Burk-Waggoner Assn.* v. *Hopkins*, 269 U. S. 110; *United States* v. *Childs*, 266 U. S. 304, 309. Applying the same principle here, it seems clear that the federal statute does not make state law controlling either by "express language" or "necessary implication."

Statutes granting courts the authority, in varying degrees, to modify alimony decrees have been enacted in at least thirty-two states, the District of Columbia, Alaska, and Hawaii. See 2 Vernier, *American Family Laws* (1932), Sec. 106; *Id.* (1938 Supp.), Sec. 106. Should the lower court be sus-

tained in its ruling that state law is the determinative factor, considerable confusion is likely to result. The present rule, which the Treasury seeks to apply with uniformity throughout the United States, would become varying and uncertain. Ambiguities in local statutes would have to be resolved. Treasury officials would be compelled to guess whether language in an opinion of a state supreme court directed at one type of alimony decree would be applied by the same court in the case of a different type of alimony decree. And difficulties in prognostication will be emphasized by the conflicting inferences that may often be drawn from loosely written opinions of some of the state courts.

We believe that such result would be unwise both practically and administratively, and respectfully submit that the power of the state court to modify the decree should not be held to be a pivotal factor in this case.

CONCLUSION

The decision below should be reversed.

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NOVEMBER 1939.

APPENDIX

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid; or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

* * * * *

SEC. 24. ITEMS NOT DEDUCTIBLE.

(a) *General Rule.*—In computing net income no deduction shall in any case be allowed in respect of—

(1) Personal, living, or family expenses;

* * * * *

Treasury Regulations 77, promulgated under the Revenue Act of 1932:

ART. 83. *Gifts and bequests.*—Property received as a gift, or received under a will or under statutes of descent and distribution, is exempt from the income tax, although the income therefrom derived from investment, sale, or otherwise is not. An amount of principal paid under a marriage

settlement is a gift. Neither alimony nor an allowance based on a separation agreement is taxable income. (See article 281.)

ART. 281. *Personal and family expenses.*— * * * Alimony and an allowance paid under a separation agreement are not deductible from gross income. * * *

Code of Iowa, 1935:

SEC. 10481. *Alimony—custody of children—changes.*—When a divorce is decreed, the court may make such order in relation to the children, property, parties, and the maintenance of the parties as shall be right.

Subsequent changes may be made by it in these respects when circumstances render them expedient. [C51, Sec. 1485; R60, Sec. 2537; C73, Sec. 2229; C97, Sec. 3180; C24, 27, 31, Sec. 10481.]

(The above provisions were part of the Iowa law at the time the divorce was granted in this case in 1925 and have remained the same since that time.)

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